No. 1004

In the Supreme Court of the United States

OCTOBER TERM, 1944

FRANKLIN PEANUT COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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FRANKLIN PEANUT COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court (R. 247–251) are unreported; the opinion of the Circuit Court of Appeals (R. 274–281) is reported at 144 F. 2d 979.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 26, 1944. (R. 281.) A petition for rehearing was denied October 2, 1944. (R. 292.) On order of this Court dated December 9, 1944 (R. 294), the time for filing a petition for writ of certiorari was extended to and including

March 2, 1945. The petition for a writ of certiorari was filed on March 1, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Section 902 of the Revenue Act of 1936, the petitioner established that it bore the ultimate burden of any part of the processing tax.

STATUTES INVOLVED

The pertinent statutes are set forth in the appendix, *infra,* pp. 14–20.

STATEMENT

The facts found by the Tax Court (R. 247–251) are as follows:

During the tax period involved herein petitioner was a partnership, composed of R. I. Beale, J. C. Beale, J. I. Beale, Jr., and Cyrus W. Beale, with its principal place of business at Franklin, Virginia. Since about 1904 petitioner had engaged in the business of cleaning, grading, and shelling peanuts, and of selling processed peanuts to wholesalers and jobbers of peanuts throughout the United States. Petitioner was a processor within the intent and meaning of the Agricultural Adjustment Act during the period from October 1, 1934, to April 30, 1935, inclusive, and during that period paid tax on the processing of peanuts in the total amount of $116,721.29. (R. 247.)

A timely claim for the refund of the $116,-721.29 paid as tax on the processing of peanuts was filed, and a notice of disallowance in whole of this claim was sent to the petitioner by registered mail on April 22, 1940. A petition for the review of the disallowance was filed on July 20, 1940, with the Processing Tax Board of Review, whose duties were subsequently taken over by the Tax Court. (R. 247–248.)

During the tax period and during the statutory period before and after the tax, petitioner purchased principally Virginia type bunch peanuts; small quantities of Spanish type peanuts were also handled. Some of the peanuts were sold cleaned but not shelled, graded as Jumbos, Fancies, and Extras. Shelled peanuts were sold graded as Extra Large, Virginia No. 1, Virginia No. 2, Spanish No. 1, and Spanish No. 2. Some peanuts were also sold as oil stock. For the tax period petitioner's sales, exclusive of oil stock, according to grades of peanuts, were as follows (R. 248):

	Pounds	Amount	Average sale price per pound
Peanuts cleaned but not shelled:			
Jumbos	814,585	$56,296.44	$0.0691
Fancies	1,114,366	69,199.97	.0621
Extras	790,897	44,150.70	.0558
Shelled peanuts:			
Extra Large	1,887,346	176,620.14	.0936
Virginia No. 1	3,442,292	278,706.90	.0810
Virginia No. 2	1,277,756	89,926.33	.0704
Spanish	170,436	13,374.65	.0785
Total	9,497,678	728,275.13	

The total number of pounds of peanuts processed during the tax period (farmers' stock weight) was 11,672,129. The total cost of these peanuts was $522,177.88, and the total gross sales value of the processed peanuts was $734,815.30. The average margin per pound of peanuts processed during the tax period was $.0082175. (R. 248.)

The total number of pounds of peanuts processed during the period before and after the tax (farmers' stock weight) was 52,548,423 pounds. The total cost of these peanuts was $1,425,681.14, and the total gross sales value of the processed peanuts was $1,744,947.58. The average margin per pound of peanuts processed during the period before and after the tax was $.0060757. (R. 248.)

The average margin for the tax period was higher than the average margin for the period before and after the tax by $.0021418 per pound; the presumption under Section 907 (a) of the Revenue Act of 1936 is, therefore, that none of the burden of the processing tax paid by petitioner was borne by it but that the entire burden of the tax was shifted to others. (R. 248–249.)

Petitioner reported a net income in its federal partnership return of income for each of the calendar years indicated, as follows (R. 249):

Year:	*Net income*
1932	$6,615.00
1933	22,319.33
1934	27,626.81
1935	40,750.53
1936	20,681.60

The net income reported for the year 1934 was in the amount of $27,626.81, after a deduction of $48,186.30 for processing tax paid with respect to the processing of peanuts within that year. The net incomes reported for the years 1935 and 1936 were revised by a revenue agent of the United States Bureau of Internal Revenue to $119,770.72 and $23,211.85, respectively, and these findings of the revenue agent were accepted as correct by petitioner's president and general manager, who was also a partner. The revised net income for 1935 was $119,770.72, after a deduction of $68,534.99 for processing tax paid with respect to the processing of peanuts within that year. (R. 249.)

Typical invoices indicate that on the effective date of the processing tax petitioner increased the sales prices of its peanuts by an amount substantially equal to the amount of the processing tax, and that immediately after January 6, 1936, when the taxing provisions of the Agricultural Adjustment Act were held to be unconstitutional, petitioner reduced the sales prices of its peanuts by an amount substantially equal to the amount of the processing tax. (R. 250.)

Petitioner, in its accounting, treated the processing tax as an item of cost, the same as the cost of peanuts, the cost of production, etc., and fully recovered the processing tax in the same manner that it recovered all other items of cost. (R. 250.)

At least 50% of petitioner's sales of peanuts were made through brokers. With respect to each such sale petitioner deducted the amount of the processing tax applicable thereto from the gross invoice price before computing the broker's commission. (R. 250.)

Beginning sometime about February, 1935, it became the practice of petitioner to stamp upon contracts entered into between it and its customers for the sale of peanuts the following language (R. 250):

> The present Processing Tax as levied by the United States Government is included in the price shown on this order, but any increase in this tax, or any other tax that may be levied by either the Federal or State Government that increases the cost of goods on this order shall be for account of buyer, and added to price herein stated.

Prior to the use of a stamp it had been the practice of petitioner to type similar provisions upon its contracts of sale of peanuts with respect to the processing of which a tax had been paid, and on many of its invoices statements as follows, or to the same effect, were either typed or stamped (R. 251):

> The processing tax has been included in the price on this shipment.
>
> * * * * *
>
> The present processing tax as levied by the United States Government is included in the price shown on this invoice.

Otherwise, petitioner represented to its customers by telephone and by letters that the prices paid by them for peanuts included the processing tax, the following typical reply having been made to a customer who inquired relative to the inclusion of the processing tax in the invoice prices of peanuts shipped to the customer during the tax period (R. 251):

> We do not see where it is necessary for us to put the certificate as outlined in your letter on each invoice covering peanuts we ship you. The peanuts we are shipping includes the Processing Tax of 1½¢ lb. on shelled peanuts and 1.05¢ lb. on peanuts in the shell. We pay 1¢ lb. tax on farmers' stock when we use them and the conversion figures are as mentioned above. When the tax on peanuts we use is due we pay same.

The Tax Court concluded that the evidence did not establish that the petitioner bore the burden of any part of the processing tax paid by it during the period October 1, 1934, to April 30, 1935, inclusive, and accordingly denied recovery. (R. 251.) The Circuit Court of Appeals for the Fourth Circuit affirmed. (R. 275–281.)

ARGUMENT

This case does not warrant further review. The decision of the Circuit Court of Appeals, affirming that of the Tax Court, was correct and there is no conflict among the circuits.

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The gravamen of petitioner's complaint (Br. 11) is that it has not had its day in court, the principal contention being that the failure of the Tax Court to make findings with respect to much of the evidence which petitioner adduced in an effort to prove that it absorbed the processing tax, shows that such evidence was given no consideration, and that this is fatal to the decision below. We think, however, that there is no basis for this argument.

The case at bar was tried (R. 247) before a member of the Processing Tax Board of Review pursuant to Section 906 of the Revenue Act of 1936, which established that Board and prescribed its procedure; subsection (e) of that section provides, *inter alia*, that the Board member assigned to conduct a particular hearing—

> shall recommend findings of fact and a decision to the Board * * * after the conclusion of the hearing.

In accordance with this mandate, Board Member Hathcock, who presided here (R. 271), made his findings of fact and, at the close of the proceedings, entered his recommendation to the Board of Review, that decision be entered sustaining the Commissioner's determination that petitioner had borne no part of the processing tax. In addition, Member Hathcock filed an accompanying memorandum in which he exhaustively analyzed and evaluated the petitioner's evidence, including the critical testimony of its witnesses; that memo-

randum appears at pages 256–271 of the record. The substance of the memorandum was that petitioner's evidence was so unsubstantiated and inadequate as to have absolutely no probative value either in rebutting the statutory presumption of shift[1] or in proving, as petitioner had the burden of doing,[2] that it actually bore the burden of the tax.

As was its right under Section 906 (c), *supra*, petitioner filed a brief with the Board of Review in respect of the presiding officer's recommendations, as did the Commissioner, and the case was thereupon submitted. However, while it was pending for decision before the Board of Review, that body was abolished and its functions were transferred to the Board of Tax Appeals by Section 510 of the Revenue Act of 1942. Subsection (c) of that section specifically provides that proceedings pending before the Board of Review on December 31, 1942 (of which the instant case was one), "shall be deemed pending in and be transferred forthwith to the Board of Tax Appeals" and further that they "shall be proceeded with and disposed of by the Board of Tax Appeals as if originally begun therein." Subsection (d) states that all the files, records, etc., of the Board of Review "shall be transferred" to the Board of Tax Appeals. It is apparent from

[1] Section 907, Revenue Act of 1936, Appendix, *infra*.

[2] Section 902, Revenue Act of 1936, Appendix, *infra*.

subsections (c) and (d) that the Tax Court had full access here to the memorandum of Board Member Hathcock as well as to the findings and decision which he recommended and the evidence on which it was based; it is clear from subsection (c) that the Tax Court was not required to rehear the case, but that it was expressly authorized, as it did, to dispose of it on the record as theretofore made.

The recommended factual findings of Member Hathcock are not in the record, but we do not question petitioner's statement (Br. 12) that the Tax Court opinion—

> is a mere restatement of the last finding made by the member of the Board of Review who presided at the hearing.

This does not show, however, that the Tax Court ignored petitioner's evidence. It would seem rather to establish that the Tax Court had, in its review of the Board member's advisory findings, surveyed also his accompanying memorandum, and that the Tax Court, checking the memorandum against the record, had come to the same conclusion with respect to the lack of any probative value in petitioner's evidence. And if the Tax Court shared the view of the presiding Board member that the petitioner's "evidence" was not persuasive, it was not required to make formal findings to that effect. Clearly, *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, rehearing

denied, 302 U. S. 772, on which petitioner relies, does not so hold.

Petitioner also argues (Br. 15) that the memorandum, being neither a finding nor an opinion, is itself valueless and must be ignored. However, petitioner has not previously made any objection to its being considered; and it is clear from the opinion below (R. 280) that the Circuit Court of Appeals regarded the existence of the memorandum and its contents as pertinent to the issue of whether the petitioner's evidence had received due consideration by the Tax Court.

Petitioner contends (Br. 16–19) that under the decision in *Webre Steib Co.* v. *Commissioner*, decided February 12, 1945, the statutory presumption became "inoperative" here on introduction of petitioner's proof. However, in its opinion in the *Webre Steib* case, this Court made no attempt to explore the question of what evidence is necessary to rebut the presumption when, as here, it operates in favor of the Government. The Court held only that in a case where the presumption operated in favor of the Government the effect of the presumption could not be to place on the claimant the burden of going forward with the evidence, for he had that burden anyway as well as the burden of proof. And it is the latter burden which is decisive here. The Tax Court did not base its decision upon the presumption created by the margin comparison;

its opinion (R. 251) clearly shows that it was the presumption of correctness attending the Commissioner's determination to which it gave heed, holding that that presumption had not been overcome by the petitioner's evidence. Furthermore, the opinion states affirmatively (R. 251) that decision against the petitioner was compelled by its failure to establish on the evidence that it absorbed any part of the processing tax—in other words, the petitioner did not carry its burden of proof under Section 902.

To be sure, the unfavorable margin comparison was evidence negativing the petitioner's claim, irrespective of its force as a presumption; very probably the Tax Court, and certainly the Circuit Court of Appeals (R. 280), considered it one of the evidentiary factors in the case. But such treatment was given express sanction by this Court in the *Webre Steib* case. In our view the case involved analyzing and weighing the evidence; and since the court below found the Tax Court to have done so under correct principles of law, its decision was entitled to affirmance. *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231; *Helvering* v. *Stock Yards Co.*, 318 U. S. 693.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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